DATE: February 19, 1999
CASE NO.: 1998-ERA-00022
1998-ERA-00026

In the Matter of

SURENDRAIAH MAKAM

Complainant

v.

PUBLIC SERVICE ELECTRIC AND GAS COMPANY

Respondent

Appearances:

Richard E. Yaskin, Esquire
Edward A. Slavin, Esquire
For Complainant

Robert M. Rader, Esquire
Christine C. Stein, Esquire
For Respondent

Before: ROBERT D. KAPLAN
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under section 210 of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. §5851 (the "ERA" or the "Act"). The Act protects employees who assist or participate in actions to carry out the purposes of the federal statutes regulating the nuclear energy industry. Section 210 provides, *inter alia*, that "no employer may discharge any employee or otherwise discriminate against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee . . . notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. §2011, et seq.)." 42 U.S.C. §5851(a)(1)(A). The Secretary of Labor is empowered to investigate and determine "whistleblower" complaints filed by employees at facilities licensed by the Nuclear Regulatory Commission (the "NRC") who are allegedly discharged or otherwise discriminated against with regard to their terms and conditions of employment for taking any action relating to the fulfillment of safety or other requirements established by the NRC.

The claim in the instant case is brought by Surendraiah Makam ("Complainant") against his former employer, Public Service Electric and Gas Company ("Employer" or "Respondent"). A hearing was held before me in Camden, New Jersey, May 28 - June 24, 1998. The parties were afforded a full opportunity to adduce testimony, offer evidence and submit post-hearing briefs. Complainant and Respondent filed proposed findings of fact and briefs on October 7, 1998, and reply briefs on October 26, 1998.

ISSUES TO BE RESOLVED

The issues to be resolved herein are:[1]

1. Whether Complainant engaged in activities that are protected under the ERA.

2. Whether Respondent discriminated against Complainant because he engaged in activities that are protected under the ERA.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

SUMMARY OF THE EVIDENCE

Complainant holds a master of science degree in aeronautical engineering from Pennsylvania State University, and received a professional engineering license from the State of New York. Complainant began his employment with Respondent in 1980, as a senior staff engineer at its Newark, New Jersey office. In the latter part of 1982, Complainant transferred to Respondent's Salem nuclear power plant, located in Salem, New Jersey, where he held the same position until the termination of his employment on August 1, 1997. Complainant was responsible for several systems at the Salem plant, including heating and ventilation within the plant's containment building. (TR 1107-1113)[2]

Respondent's technical specifications surveillance requirement ("tech specs") provide: "Primary containment average [temperature] shall not exceed 120 degrees Fahrenheit." (R-55) Prior to March 1995, Respondent had used ten measurement locations within the nuclear containment dome (hereinafter referred to as the "containment") to determine the average overall temperature of the containment. Although the use of the ten points resulted in a more accurate representation of containment average air temperature, Respondent determined that this practice was not in compliance

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[1] At the hearing, I ordered the case bifurcated into separate proceedings for liability and remedy. This decision will address only the question of Respondent's liability.

[2] The following abbreviations are used herein: "P" refers to Complainant's exhibit; "R" refers to Respondent's exhibit; "TR"refers to the transcript of the hearing before me.

with the "tech specs" requirement of using only five points to determine the average air temperature. Respondent reported this non-compliance to the NRC in a License Event Report dated May 18, 1995. In the course of correcting the situation, Respondent recognized that using five points instead of ten could permit the selection of measurement locations that do not provide a representative indication of the overall containment atmosphere, which could result in an "unconservative containment average temperature being calculated." (R-55, P-48)

In March or April 1996, Respondent hired MPR Associates of Alexandria, Virginia ("MPR") to prepare a detailed analysis providing a "design basis" for measuring containment temperature, i.e., to determine the five most representative temperature-recording locations. (TR 11, 1171) The MPR report was issued on June 7, 1996. It recommended that (1) five measurement devices (thermocouples) be placed at various elevations within the containment dome, and (2) measurements from these five locations should be averaged using a volume-weighted method, rather than the arithmetic method that had been used previously. (TR 156, P-18) Under the volume-weighted method, larger portions of the containment area are given more weight in the calculation of the overall average temperature. For example, in a calculation of the overall average temperature, the recorded temperature in the upper two-thirds of the containment area is "given twice the weight corresponding to its twice as large volume as compared to the [recorded temperature in the] lower portion of the containment." (TR 366) At the time the MPR report was issued, it was theorized by both MPR and Respondent that the upper portions of the containment would yield higher temperatures and therefore the volume-weighted method would result in more conservative calculations than the arithmetic method.[3] (TR 1829)

The plant's operations were shut down in May 1995, and for the next two years Respondent prepared for the resumption of operations. (TR 16, 157) On October 4, 1996, Complainant, his supervisor, Greg Cranston, and his manager, Jack Curham,[4] signed a report stating that they had reviewed and approved the MPR methodology. (TR 157, R-53) Respondent then adopted the MPR methodology and initiated plans to implement the new methodology when the plant resumed operating. (TR 16,157) On October 8, 1996, Complainant was assigned to complete a temporary modification ("T-Mod") to measure the temperatures in the upper levels of the containment and to provide a design basis, i.e., to determine the five best locations to place the permanent thermocouples recommended by MPR. (This was seen as a refinement of the MPR methodology because MPR's original report only estimated temperatures in the containment dome and did not designate permanent thermocouple locations.) (TR 16, 1206-1208; R-52)

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[3] The parties stipulated that the MPR methodology results in a higher computed overall average containment temperature than does the arithmetic methodology. (TR 1985)

[4] Both Cranston and Curham left Respondent's employment before the plant resumed operating in the summer of 1997.

On June 23, 1997, roughly a week before the plant was to begin operating again, Complainant and another engineer, Phil Lawson, submitted a draft of the T-Mod. (TR 13) A few days later, Frank Soens, a manager in the operations department of the plant, expressed doubts as to whether the measurements of the temperatures in the upper areas of containment were necessary for the restart of the plant. (TR 13) Soens suggested in an e-mail to Complainant and others that the T-Mod be "scrapped." (TR 1233) In late June-early July, the plant went back on-line, with the new MPR methodology being implemented. (However, at this point in time, the T-Mod assignment had not been completed.) On July 8, 1997, Respondent determined that the calculated average temperature in the containment had reached approximately 116.6 degrees and was approaching the 120 degree limit for average containment temperature set forth in the tech specs. If the calculated containment temperature rose to 120 degrees, the plant would have to be shut down. On July 8, in an attempt to rectify the problem, Complainant's new manager, Joseph Moaba (who had become the manager of mechanical and civil design engineering in June 1997), convened a group of engineers, including Complainant. Moaba testified that the objective was to refine the MPR-based calculation to provide "short-term ... relief." (TR 143, 150) Moaba, who had not previously worked on containment air-temperature issues, then familiarized himself with the "history of the temperature measurements"by reading the existing documentation and talking with engineers who had "lived through the history of the containment issue and [changes in the calculation methodology]."[5] (TR 150) On July 8, Moaba also discovered that Complainant was one of the principal engineers who had been involved with the issue for a "long period of time." (TR 150) Moaba testified without contradiction that on July 8 he discussed the issue with Complainant, who told Moaba "that he [Complainant] knew what the [MPR] calculation was, he knew the MPR report and he knew that it would lead to temperatures higher than 120 degrees." (TR 151) Moaba was not aware at this time (nor did Complainant tell him) that Complainant had been assigned the T-Mod to refine MPR's methodology in 1996. (TR 187)

The group of engineers (including Complainant) assigned the task of refining MPR's method came up with a short-term solution on the same day the 116.6 degree average temperature problem arose (July 8, 1997). The group sent a technician "up the side" of the containment to measure temperatures at different levels with a hand-held thermometer. Based on the measured temperatures, the group determined that there were stratified layers of air with different temperatures. The group then "plugged" the measurements from the stratified layers into the MPR volume-weighted formula and thereby "brought the calculated containment average down approximately three degrees [to 113 degrees]." (TR 178, R-57) The refined calculation, signed by Complainant as the "originator of the

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[5] Moaba testified that he had not known of the MPR report because prior to the 116.6-degree reading on July 8, 1997, the "methodology used to calculate containment temperature was one of thousands of calculations that were done within the mechanical civil organization, perhaps tens of thousands." Moaba stated: "In the heat of starting the unit up, I was focused on one crisis after another and this was not a crisis. As soon as it became a crisis, then my attention became focused on it and I learned of the situation." (TR 152)

document" and approved by Complainant's supervisor, was presented to Moaba on the morning of July 9. (TR 180, 216) Moaba told the "whole team that they did a good job." (TR 216) Moaba then presented the calculation to David Garchow, director of design engineering. (TR 82) Moaba and Garchow discussed the temporary refinements and possible permanent solutions. They also discussed the possibility that one of Moaba's engineers might have known of the problem early on and had not spoken up, and that as a result they "may have missed an opportunity to resolve this prior to getting up to the 116 degrees." (TR 99) During this conversation, no engineer was identified who may have had prior knowledge of the problem. (TR 97, 99)

After the temporary refinement had been completed and the calculated average containment temperature had been "lowered" to 113 degrees, Moaba turned his attention to Complainant's statement that he knew that this problem would happen. (TR 240) Moaba more extensively reviewed the MPR methodology and the "historical data plugged into the formulas used," and testified that he determined from this that it was "very clear that [there would be] problems with meeting [the] 120 degrees [tech spec limitation] through the summer."[6]

Moaba testified that because Complainant was the senior engineer who was responsible for the "containment building, ventilation system and all attendant issues," and he had known for some time that there would be a problem in meeting the 120 degrees tech spec limitation through the summer, it had been Complainant's "obligation to keep the plant in a situation that meets all the rules, regulations, and commitments that are [necessary] to keep the plant running safely." Moaba testified that if Complainant perceived barriers to meeting that obligation it was Complainant's responsibility to "bring it up to his management." (TR 239) Moaba testified that, based on the foregoing, and on a review of Complainant's employment file which revealed that Complainant had a history of poor work performance, it was necessary for him to place Complainant on a performance improvement plan (PIP).[7] (TR 173) On July 10, 1997, Moaba told Complainant of his decision to place him on a PIP. Complainant responded by requesting that Moaba implement a previous PAP/PIP that had been recommended (but had not actually been implemented) when Jack Curham was his manager. (TR

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[6] Respondent eventually concluded that the MPR method was overly conservative and that it was not necessary to obtain the temperature in the upper containment in order to calculate the overall average temperature. In addition, on July 17, 1997 a group of engineers issued a report which recommended a reversion to the original arithmetic method. (Complainant was not included in the group.) (R-51; TR 2663-2664)

[7] Respondent's employees are periodically rated and ranked. A ranking of tier three ("needs improvement") requires that an employee be placed on a performance action plan (PAP). A ranking of tier 4 ("unsatisfactory") requires that an employee be placed on a performance improvement plan (PIP). (TR 824-828) When Moaba reviewed Complainant's file, he discovered that Complainant had been placed on both PIPs and PAPs in the past. (TR 173)

169) Moaba reviewed the previous PIP/PAP and concluded that most of the items in it were "not measurable." Therefore, Moaba decided that Complainant should be placed on a new PIP, he prepared two items for it, and decided to allow Complainant to devise additional PIP tasks to be accomplished by him. Moaba discussed his decision with Complainant, and Complainant, who disagreed with Moaba's decision to write a new PIP (rather than implement the old one), refused to provide any PIP tasks. Moaba testified, without contradiction, that when he explained to Complainant why it was necessary to write a new PIP, Complainant stated that he "couldn't do it." (TR 170) Complainant testified that he wanted to "be carried on the existing PIP," and he offered no understandable explanation of why he never prepared any of his own PIP tasks. (TR 1314-20)

When Complainant refused to cooperate in preparing the PIP, Moaba contacted Debra Straubmuller of Employer's human resources department, and asked her what was the appropriate course of action. Straubmuller told Moaba to write the entire PIP for Complainant. Straubmuller also told Moaba that the PIP should be "specific, measurable, and achievable." (TR 838) Moaba then wrote up a PIP containing eight tasks and gave it to Complainant on July 14. On July 15, Complainant asked Moaba to extend the due dates for some of the PIP assignments. Moaba refused to do so, and told Complainant that the time for negotiating the due dates was between July 10 and 14. (TR 171) Complainant replied, "why don't you just terminate me now." Moaba responded that he was simply "following the company procedures." (TR 1409, R-28)

In late July 1997, Moaba again went to Straubmuller and stated that both he and Complainant's supervisor, David Dodson,[8] were unhappy with Complainant's progress and performance on the PIP, and they recommended that Complainant be terminated. (TR 841-842, R-35,36) Based on these recommendations, Straubmuller initiated termination proceedings for Complainant. (TR 844-848) On August 1, 1997 Moaba gave Complainant a letter stating that Complainant had failed to make sufficient progress on his PIP and that for that reason Complainant was being terminated, effective August 1, 1997. On August 15, 1997, Complainant appealed his termination to Employer's "Employee Relations Review Panel" ("ERRP"). In his appeal, Complainant alleged that he was terminated for raising safety concerns (R-38) The ERRP held a hearing on November 14, 1997. On December 1, 1997 the ERRP notified Complainant by letter that "management's decision to discharge" complainant was being upheld. (R-62)

DISCUSSION

1. PROTECTED ACTIVITY

[8] Dodson became Complainant's supervisor in late July 1997. Up to that point, Complainant's immediate supervisor had been Allen Meinershagen. (TR 1476) Meinershagen was a temporary supervisor for the "specialty engineering group" over Complainant and eight other engineers. (TR 2581)

A. Complainant failed to establish that he engaged in protected activity prior to his August 1,1997 termination.

The initial question to be resolved is whether Complainant's October 4, 1996 approval of the report which recommended utilizing the more conservative MPR methodology and his subsequent work on the temporary modification (T-Mod) to measure the temperatures in the upper levels of the containment constitute protected activity.

Complainant, in his January 6, 1998 complaint, asserts that his protected activity consisted of "signing the internal, more conservative temperature calculation methodology safety report of October 4, 1996 and adhering to that more conservative temperature calculation when performing interim calculations on July 9, 1997." In his brief, Complainant reiterates that this "adherence" to the more conservative MPR methodology and his stated commitment to refine that conservative methodology constitute his protected activity. Respondent contends that Complainant never made any communication, oral or written, that expressed a definitive and specific safety concern.[9]

The purpose of the Act is to encourage the reporting of matters involving or relating to nuclear safety. The Act must be read broadly because "[a] narrow hypertechnical reading of section 5851 will do little to effect the statute's aim of protecting." Kansas Gas & Electric Company, 780 F.2d 1505 (10th Cir. 1985), cert. denied 478 U.S. 1011 (1986). The Act has a "broad, remedial purpose for protecting workers from retaliation based on their concerns for safety and quality." Mackowiak v. University Nuclear Systems, 735 F.2d 1159 (9th Cir. 1984). Courts and the Secretary of Labor have broadly construed the range of employee conduct which is protected by the employee protection provisions contained in environmental and nuclear acts. See S. Kohn, The Whistleblower Litigation Handbook, pp. 35-47 (1990). In order to establish a *prima facie* case of discrimination under the ERA, a complainant's charge must relate to some aspect of nuclear safety. Decresci v. Lukens, 87-ERA-13 (Sec'y Dec. 16, 1993). In Jarvis v. Battelle Pacific NW Laboratory, 97-ERA-15 (ARB Aug. 27, 1998), the Administrative Review Board (the "ARB") held that "[t]he protection afforded whistleblowers by the ERA extends to employees who, in the course of their work, must make recommendations regarding how best to serve the interest of nuclear safety, even when they do not allege that the *status quo* is in violation of any specific statutory or regulatory standard." The ERA is designed to protect workers who report safety concerns and to encourage nuclear safety generally. Mackowiak, 735 F.2d at 1163 (9th Cir. 1984)

At the outset of the hearing, Complainant's counsel described the protected activity as Complainant's "stated commitment to stand by the MPR process and to implement it, even against

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[9] As will be discussed below, Respondent is correct, except that Complainant did send a written safety concern regarding the containment issue to both Respondent and the NRC subsequent to his termination on August 1, 1997.

the company's desire not to test the [temperature] data in the upper region [of the containment dome]." (TR 25) Complainant's counsel asserted that Complainant stated this "commitment" to Complainant's supervisor, Meinershagen, Complainant's manager, Moaba, and to Soens of operations. (TR 26) However, it is unclear from the record whether Complainant ever made such a "commitment," and there is no evidence that complainant ever communicated such a commitment to Respondent. Complainant claims that his "commitment" is documented in R-52. However, R-52 is an assignment from Respondent's "Nuclear Business Unit" to Complainant, accepted by him. The R-52 assignment was to complete the T-Mod to measure the upper levels of the containment and to determine the five best locations to place the permanent temperature recording devices. This document does not demonstrate or convey a "commitment" by Complainant to adhere to any particular methodology for safety reasons. Further, Complainant's testimony regarding his alleged adherence to the MPR method is unclear and conflicting. Although Complainant first acknowledged that the arithmetic method could be a safety concern and that the MPR volumetric method was not, Complainant later testified that he told Moaba that the "MPR formula is too ... conservative," and that Moaba "didn't have anything to worry about because the T-Mod project would relieve the situation." (TR 1377, 1941) Complainant also stated that he advocated a "less conservative approach than what the MPR [recommended]." (TR 4354) However, at another point Complainant testified that *any* methodology that would show a lower temperature than the MPR methodology would constitute a safety concern. (TR 1377) Thus, it cannot be determined from Complainant's testimony which method he himself advocated and which method, if any, he believed would constitute a safety concern if implemented.[10]

Although Complainant's counsel asserted that Complainant raised concerns to Meinershagen, Moaba, and Soens, Complainant did not testify that he did so. Complainant's interaction with these individuals is set forth below.

Soens

Although Complainant stated that he was "shocked and surprised" upon receiving Soens' e-mail to scrap the T-Mod (TR 1233), Complainant did not offer testimony to establish that he "resisted Soens' e-mail" (asserted in Complainant's brief) or reacted to that e-mail by raising a safety concern to Soens

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[10] The parties stipulated that because the MPR methodology utilized temperature measurements from the hotter, upper areas of containment and weighted these measurements, since the upper areas of the containment were greater in volume, the MPR methodology results in a higher computed overall average containment temperature than does the arithmetic methodology. (TR 1985) However, Complainant, in his testimony, appeared to be confused as to whether or why the MPR methodology would be considered more conservative than the arithmetic method. For example, Complainant agreed that the "MPR anticipated that if you put the data loggers at higher elevations, the resulting temperatures there would be lower than in the other portions of the containment." Complainant also stated that he was not surprised when the measured temperature was lower in the upper elevations of the containment area. (TR 1703)

or any other manager or supervisor. Complainant did not convey to Soens or anyone else that he believed that the T-Mod should be completed in the interest of nuclear safety or that "scrapping" the T-mod would in some way compromise safety. Rather, Complainant's testimony reveals that, upon receiving Soens' e-mail, he did no more than brief Meinershagen regarding the purpose of the T-Mod (to measure the upper areas of the containment and to determine the five best locations to place the permanent data loggers):

> Q: Why did you show Soens' e-mail to Mr. Meinershagen?
>
> A: Meinershagen was new to the company. He didn't know many of the activities going on, so he is acting supervisor, he wanted to be alerted what Frank Soens is talking about this T-mod project.

(TR 1237) Based on the record, it appears that Complainant had no other discussions with his superiors regarding Soens' e-mail message.

Meinershagen

Complainant did not establish by his testimony that he raised safety concerns to Meinershagen. Indeed, Complainant testified that he had "very little interface" with Meinershagen. (TR 1139) Further, Complainant stated, as noted above, that his discussion with Meinershagen about containment temperature consisted of a brief summary regarding the nature of the T-Mod assignment. Complainant testified that he did not discuss ventilation questions with Meinershagen or other supervisors during the period when Meinershagen was his temporary supervisor:

> Q: If you had a ventilation question, who did you go to?
>
> A: Most of the things I can pretty much do on my own. Very few times on policy matters, maybe I had to go to the supervisor or manager, but on technical grounds I can do pretty much well.[11]

(TR 1141) Based on a review of Complainant's entire testimony, it appears that he had only the one discussion with Meinershagen regarding containment temperature, discussed above.

Moaba

Complainant did not establish by his testimony that he raised safety concerns to Moaba. Complainant testified that he did not have any personal contact with Moaba before July 8, 1997, and that the containment temperature issue "had not come up before that time." (TR 1283) Complainant also testified that when the issue came up on July 8, he recalled only briefing Moaba on the MPR methodology: "I give him the MPR report, hard copy of the MPR report, how it started, and the operating procedure of the plant what to use to measure or calculate the temperature in the containment." Complainant could not recall "filling him in on any other information on the subject."

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[11] Complainant did not explain what he meant by "policy matters" or specifically identify any "policy matters" he raised with his supervisors during his employment.

(TR 1284) Complainant also testified that on July 8 and 9, when he and others were assigned the task of temporarily relieving the problem of the containment reaching a calculated average overall temperature of 116.6 degrees, his only interaction with Moaba was as follows:

> Q: What occurred on the morning of July 9 involving Mr. Moaba?
>
> A: On July 9 I generated the calculation curve which summarizes all of the calculation done which is nothing but a refinement of the MPR calculation. It was signed, approved by Allen Meinershagen. That document, the next morning I went to Joe Moaba's room and handed it to him and told him this is the result we can save about 3 degrees based on this new refined methodology and he thank about it that we have more margin not to exceed the 120 limit. He was happy and complimented for the work done on the eighth (sic).
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> Q: Did you have any other discussion with him at that time?
>
> A: No, I don't have any conversation afterwards.

(TR 1306) Further, Complainant testified that after his July 9 conversation with Moaba he "never discussed the temperature issue with anyone." (TR 1899) When Moaba was asked whether Complainant expressed support for the MPR method and opposition to Respondent's plans to revert from the MPR method back to the original arithmetic method, Moaba testified that "there was not one person that I have ever talked to that heard Mr. Makam make any complaint about this change or make any words of support for the MPR report. Mr. Makam never once spoke up in objection to this." (TR 442) Moreover, at Complainant's ERRP hearing on November 21, 1997, Complainant was repeatedly asked whether, and to whom, he raised a safety concern. Complainant stated only that he raised a concern subsequent to his termination on August 1, 1997. (P-68)

Despite the generally broad application of §5851, courts and the Secretary have held that the ERA protects only certain types of acts. First, an employee must in some way communicate or report the safety concern, either by internal complaint or by complaint to an outside entity or authority. See Dobrewenaski v. Associated Universities, Inc., 96-ERA-44 (ARB June 18, 1998; see also Scerbo v. Consolidated Edison Co. of New York, Inc., 89-CAA-2 (Secy Nov. 13 1992); Conley v. McClellan Air Force Base 84-WPC- 1 (Secy Sept. 7, 1993); Francis v. Bogan, Inc., 86-ERA-8 (Sec'y Apr. 1, 1988) (the employer must know about the protected activity for the complaint to be actionable). Second, an employee's acts must implicate safety definitively and specifically. American Nuclear Resources v. U.S. Dept. Of Labor, 143 F.3d 1292 (6th Cir. 1998), citing Bechtel Construction Co. v. Secretary of Labor, 50 F.3d 926 (11th Cir. 1995). In Bechtel, the court protected the employee's acts because he "raised particular, repeated concerns about safety procedures," which were "tantamount to a complaint." Bechtel, 50 F.3d at 931. However, the record in the instant case, including Complainant's own testimony, contains no evidence that he communicated a "commitment" to utilize the more conservative MPR method, or a complaint to his supervisors or to management

regarding the temperature issue prior to his termination on August 1, 1997. Therefore, I find that Complainant has failed to establish that he raised safety concerns regarding the calculation of containment air temperature prior to his termination.

Complainant also argues in his brief that the reporting of safety violations in the course of an employee's regular duties is protected activity, citing Jopson v. Omega Nuclear Diagnostics, 93-ERA-54 (Sec'y Aug. 21, 1995), and White v. The Osage Tribal Council, 95-SDW-1 (ARB Aug. 8, 1997). In this, Complainant is correct. However, the record in the instant case fails to establish that Complainant made such a report. In Jopson, the employee's duties involved quality control, and he specifically reported a safety violation to a supervisor. In White, "the very essence of [the employee's] job was to monitor and report compliance with the [Safe Drinking Water Act] to a government agency, the EPA." In the case at hand, although it is true that part of Complainant's duties indirectly involved maintaining compliance with the NRC tech spec guidelines (insofar as the entire plant was under the continuing obligation to observe the tech specs), no evidence has been produced to suggest that Complainant reported safety violations in the course of his regular duties or that the *essence* of Complainant's job was to report compliance with NRC guidelines.[12]

Complainant further argues in his brief that he engaged in protected activity when he complained to his manager "about his mistreatment, and being beaten, humiliated and scapegoated."[13] Complainant relies on Minard v. Delemar Co., 92-SWD-1 (Sec'y Jan. 25, 1994), as support for this proposition. In Minard, the Secretary held that both Title VII case law and previous Department of Labor decisions support the conclusion that an employee's reasonable belief that his employer is violating the statute may be a sufficient basis for a retaliation claim if the employer took action against the employee because he expressed his belief. I find that Minard is inapposite. The issue in Minard was "whether an employee who complains to his or her employer about the treatment of a substance which is not listed as a hazardous waste under the [Solid Waste Disposal Act's] whistleblower provision may be protected by [the statute's] whistleblower provision." The Secretary concluded that where the complainant has a reasonable belief that the substance is hazardous and is regulated as such, he is protected under the statute. Applying this reasoning, in the instant case Complainant produced no evidence to show that his complaints of mistreatment and "scapegoating" were protests or opposition to some reasonably perceived violation of the ERA. There is no evidence in the record that indicates Complainant ever raised or reported a reasonably perceived safety violation, or that Complainant protested his perceived mistreatment *because* he believed that it occurred in retaliation for raising any safety concerns or reporting any safety violations. See Dias-Robainas v. Florida Power and Light, 92-ERA-10 (Sec'y Jan. 19, 1996).

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[12] Rather, Complainant testified that his responsibility was design engineering for various systems including the containment ventilation system. (TR 1110-1115, 1860) Complainant never asserted that the essence of his job was to maintain and report nuclear safety compliance.

[13] Complainant also claims that he complained to the human relations department, the ERRP and to the NRC, however, those complaints were made after the August 1 termination.

At the hearing, when asked if he ever raised concerns of discrimination to Moaba, Complainant testified:

> [W]hen he told me that because of this reason you are going on the PIP and he told me your previous performance is not good, I felt very bad about it. It was like a shock to me. I did my best to alleviate the situation and he wanted to put me on a PIP which is not warranted for any reason at the same time. He could have waited for a month or a week or something like that to do it, but he did it the very next day [after the July 8 refinement calculation was completed].
>
> Q: Did you raise concerns about discrimination in that meeting?
>
> A: I did not....I don't remember using the word discrimination in that meeting.

(TR 1339)

In fact, the evidence shows that when Complainant complained of being placed on a PIP — the only challenge he made to Respondent's actions after the containment temperature problem arose — he did not believe that Moaba was discriminating against him because he raised a safety concern; rather, just the opposite. Complainant testified that the reason Moaba was unfairly holding him responsible for "not speaking up" about the containment issue prior to July 8, 1997, i.e., because Complainant had approved the MPR report without raising a warning, when it was clear that the MPR methodology would result in a calculated average containment temperature that would exceed the tech spec limit in the hot summer months. In this regard, Complainant testified:

> Q: Did you use the word that you were taking the blame for being the last one left [of the involved employees] to Mr. Moaba?
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> A: That is true. He was -- He was telling to me that I should be responsible for the issue of the high temperature in the containment.
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> Q: (By Administrative Law Judge)
>
> Wasn't that the basic difference between the way Mr. Moaba felt and the way you felt. He felt that you should have done something active to alert somebody in a higher authority about the potential temperature problem due to the MPR methodology and you felt that that was already known and you didn't have to do anything?
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> A: You're right.
>
> Q: (By Administrative Law Judge)
>
> That's what it was all about?
>
> A: Yes, sir.

(TR 1413-1414)

In light of the above, I find that Complainant has not established that he engaged in protected activity when he complained "about his mistreatment, and being beaten, humiliated and scapegoated."

Based on the foregoing, I find that Complainant has failed to establish that he engaged in protected activity prior to his termination on August 1, 1997.

B. Complainant engaged in protected activity after his August 1,1997 termination.

I find that Complainant engaged in protected activity when he contacted the NRC on August 4 and 15, 1997, and Respondent's human resources department on August 15, 1997, and stated that he was terminated in retaliation for his signing, approval, and advocacy of the more conservative MPR methodology.

2. DISCRIMINATORY CONDUCT

To establish a *prima facie* case of retaliatory discrimination under the ERA, an employee must show that: (1) he engaged in protected activity; (2) the employer was aware of that protected activity; and (3) the employer took some adverse action against him. The employee must present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. Dartey v. Zack Co. of Chicago, 82-ERA-2 (1983). In the instant case, the adverse actions consist of Employer placing Complainant on a PIP, excluding him from a July 9, 1997 meeting regarding containment air temperature and from the group that approved the reversion back to the arithmetic method, and, ultimately, discharging him. The presence of a retaliatory motive is provable by circumstantial evidence even if witnesses testify that they did not perceive such a motive. See Ellis Fischel State Cancer Hosp. v. Marshall, 629 F.2d 563, 566(8th Cir. 1980), cert. denied, 450 U.S. 1040(1981).

If the employee establishes a *prima facie* case, the employer has the burden of producing evidence to rebut the presumption of disparate treatment by presenting evidence that the alleged disparate treatment was motivated by legitimate, nondiscriminatory reasons. The employer bears only a burden of producing evidence at this point. The ultimate burden of persuasion remains with the employee. If the employer successfully rebuts the employee's *prima facie* case, the employee may yet prove that the proffered reason was not the real reason for the employment decision. The employee may succeed in this either by directly persuading the adjudicator that a discriminatory reason more likely motivated the employer or by indirectly showing that the employer's proffered explanation is unworthy of credence. The trier of fact may then conclude that the employer's

proffered reason for its conduct is a pretext and rule that the employee proved actionable retaliation for protected activity. However, the trier of fact may conclude that the employer was not motivated, in whole or in part, by the employee's protected conduct and rule that the employee has failed to establish his case by a preponderance of the evidence. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Because this case was fully tried on the merits, it is not necessary to determine whether Complainant presented a *prima facie* case and whether Respondent rebutted that showing. Adjiri v. Emory University, 97-ERA-36 (ARB July 14, 1998);U.S.P.S. v. Aikens, 460 U.S. 711, 713-714 (1983). Once Respondent has produced evidence in an attempt to show that Complainant was subjected to adverse action for a legitimate, nondiscriminatory reason, it no longer serves any analytical purpose to answer the question of whether Complainant presented a *prima facie* case. Instead, the relevant inquiry is whether Complainant prevailed by a preponderance of the evidence on the ultimate question of liability. See St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993); Darty v. Zack Co. of Chicago, 82-ERA-2, (Sec'y Apr. 23, 1983).

A. Complainant failed to establish that Respondent's actions against him were based on a retaliatory or discriminatory motive.

I have found that Complainant has not established that he engaged in protected activity prior to his August 1, 1997 termination. Even assuming, *arguendo,* that Complainant had established that he engaged in protected activity while employed by Respondent, I find that Employer's actions against Complainant — the poor performance rating, termination of employment, and Respondent's other actions against him — were motivated by legitimate, nondiscriminatory reasons.

Complainant's manager, Moaba, testified that he originally placed Complainant on a PIP after the containment temperature problem arose on July 8, 1997, because Complainant knew that the tech specs would likely be violated in the summer months but he took no action, such as notifying supervisors or operations personnel. Because Complainant was a senior engineer with responsibility for the containment building, ventilation system and all attendant issues, Moaba believed that it was Complainant's "obligation to keep the plant in a situation that meets all the rules, regulations, and commitments" that are [necessary] to keep the plant running safely. Moaba believed that if Complainant perceived barriers to the accomplishment of his responsibilities it was Complainant's obligation to "bring it up to his management." (TR 239) Moaba believed that Complainant's "lack of speaking up" was "an issue that required ... immediate action", and he responded by placing Complainant on a PIP. (TR 416) Moaba testified that he refused Complainant's suggestion that Moaba implement the previous PAP/PIP that had been written when Jack Curham was Complainant's manager because "most of the items on the previous PIP/PAP were not measurable." (TR 169-170) Moaba also testified that after he consulted with Straubmuller, he decided to implement a new PIP because of: (1) Complainant's silence on the temperature issue; (2)

Complainant's prior history of being placed on PIPs and PAPs;[14] and (3) Complainant's refusal to cooperate in writing a new PIP. I find that Moaba's testimony states an adequate and legitimate basis for his decision to place Complainant on a PIP.

Further, Complainant's own testimony corroborates Moaba's stated reasons for placing Complainant on the PIP. Complainant admitted that he had been assigned the primary responsibility for containment issues. (TR 1110) Complainant also conceded that he believed Moaba put him on the PIP because Moaba felt that Complainant should have informed management about the problem with meeting the tech specs. (See questions by the Administrative Law Judge and Complainant's responses, set forth above at page 13.)[15]

I also find that it was appropriate for Moaba to write Complainant's new PIP himself, since Complainant persisted with his idea that the old PIP should be implemented and refused to cooperate in preparing the new PIP. (TR 409, 1317-1320) Further, I find that Moaba's refusal to accommodate Complainant when he requested that Moaba extend the due dates for various assignments was not discriminatory. Complainant was given the opportunity to write a portion of his own PIP during the July 10-14 period, but declined to do so. (R-27) When Moaba himself wrote the new PIP in its entirety and presented it to Complainant on July 14, he specifically asked Complainant if he had problems with the deadlines. Complainant offered no reply at that time, but came back the next day and asked to change certain dates. Moaba replied that he was not willing to extend the dates and that the time for negotiation had been between July 10 and 14. (TR 171) I find this was a reasonable response by Moaba. Moreover, Complainant's testimony does not refute Moaba's account of these events. Complainant stated that at the July 10 meeting Moaba "had it all down on a piece of paper, two items to be included in the PIP that he had already...[t]hese are the two items I want you to put in the PIP and two more items you can pick and come back with a new PIP by Monday." (TR 1318) Complainant testified that he told Moaba that he "wanted to be carried on the existing PAP and [that Moaba] wanted to generate a new PIP on that day." Complainant also testified:

> Q: What was your reaction to [Moaba's] demand that you write the new PIP? Did anything else happen in that meeting on the tenth?

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[14] Moaba stated that he reviewed Complainant's performance appraisals from 1994-1997. (TR 3694-3699) Moaba also stated that "the most recent appraisal (April 1997) was that [Complainant] should be placed on a combination PIP and PAP for the performance appraisal for that year...." Moaba concluded after reviewing that performance appraisal along with the previous appraisals that Complainant's "performance ... had not been improved over the last several years." (TR 172-173)

[15] Complainant stated that since the operations department had approved the MPR calculation and since the entire MPR report was generally available on Respondent's computer system, he believed that there was no need to alert anyone to the potential tech spec violation. (TR 1313-1315)

A: No, I took the paper and that's where we stopped the thing.

(TR 1319) Complainant offered no explanation as to why he did not write his PIP by Monday, as was discussed, according to him, at the July 10 meeting. Finally, other witnesses corroborate Moaba's testimony that Complainant refused to prepare a new PIP. Meinershagen, who was present at the July 10 meeting, testified that Complainant stated that he wasn't going to prepare a new PIP. (TR 2631) Meinershagen stated that Moaba told Complainant to contact Straubmuller if he had any questions. (TR 2629) Straubmuller testified that sometime in July 1997 Complainant came to her and asked what would happen to him if he did not write a PIP. Straubmuller told Complainant that if he did not write his own PIP, one would be written for him. (TR 982) Accordingly, I find Moaba's decision to write the PIP himself and to strictly adhere to the deadlines of the PIP to be nondiscriminatory.

I further find that Moaba articulated a legitimate reason for recommending that Complainant be terminated shortly after he was placed on a PIP. Moaba testified:

> We had a series of steps in the performance improvement plan that he needed to follow. When we came up to the steps that were dated in late July, 7/23 specifically, and Mr. Makam was nowhere near completing those and, in fact, was still very clearly confused to what they meant and were (sic) submitting documents in a haphazard manner that showed he didn't understand what was happening despite supervisory help and discussions. He not only missed the dates but it was clear to my mind he had no potential for making them up within the next week or so in a reasonable amount of time. When that happened, and that's why I would say the date in my mind is the 26th, 27th of July, that's when it pushed me over the edge to this determination.

(TR 388) The record reveals that Complainant did not successfully meet deadlines for many of his PIP assignments. P-9, which is a list of the PIP items and their due dates and handwritten annotations by Complainant documenting when he completed each item, shows that out of eight PIP assignments, two were completed timely, two were one day late, one was two days late, and three were never completed. Under the heading "Fuel Handling Building HVAC," item one is listed as due on 7/18/97 and noted by Complainant as being completed on 7/19/97. Under the same heading, item three is listed as due on 7/23/97 and simply noted by Complainant as "not received." Complainant admitted that it was his responsibility to go to Meinershagen to get this item approved and that he did not do so. (TR 1446) Under the heading "Containment Air Temperature Monitoring," item two is listed as due on 7/25/97 and noted by Complainant as "scheduled for installation" on 7/26/97. Under the same heading, item three is listed as due on 7/23/97 and noted by Complainant as completed ("given to Dave Dodson") on 7/25/97.

Further, Complainant's own testimony shows that he did not complete many of his PIP assignments on time and that when they were handed in, the assignments were found to be unacceptable by supervisors. Complainant admitted that he handed in his first PIP assignment one day late (the assignment was due July 18 and handed in July 19). (TR 1443) Complainant also

admitted that his supervisors were not happy with both the lateness and quality of the assignment when it was handed in after July 19:

Q: Do you recall a meeting on or about July 24, with Mr. Dodson and Meinershagen about the progress of your PIP?

A: Yes, sir.

Q: Was that first meeting to discuss the PIP with Mr. Dodson, as your new supervisor?

A: Yes, sir.

Q: Do you recall what he said to you, Dodson?

A: Meinershagen, Dale Dodson and myself in the room. I explained each item, what I've done. And I have — he had the design basis on the fuel ending building.

Q: And what did he say about — what did Mr. Dodson say about that?

A: Dale Dodson said he is not happy with the design basis document. He was looking for a road map for a newcomer who can come to the department and be able to handle that job. That was his understanding. But I didn't have that understanding when I was assigned to that one. And he said he had revised this one. And you already missed the due date of 7/18.

As for item two of Complainant's PIP, "obtain approval from supervisor of design basis," Complainant admitted that he did not get the required approval:

Q: (By Administrative Law Judge)

Back to item number two, "Obtain approval from supervisor of design basis." Now, correct me if I'm wrong. To me, this puts the burden on you, since this says you're to go to your supervisor, apparently Mr. Meinershagen, to obtain his approval.

A: Yes, sir.

Q: And did you ever say to Mr. Meinershagen, is this item approved?

A: I didn't.

Q: And why is that?

A: I was expecting that he was going to tell me about the design basis document I gave him on December 19. And he did not tell me. And I did not approach him, what happened (sic).

(TR 1447) Complainant offered no explanation as to why he did not "approach" Meinershagen to get the required approval for the completion of the assignment.

Complainant also conceded that he was two days late in handing in his third PIP assignment, under the heading of "Containment Air Temperature Monitoring." Complainant offered no explanation for the late completion of this assignment.

The first PIP assignment under the heading "Containment Air Temperature Monitoring" was completed on time. However, Complainant testified that it was actually completed by another engineer:

Q: Were you told, during your performance improvement plan assigned by Mr. Moaba, to calibrate the data loggers that were going to be used?

A: Yes, sir.

Q: Mr. Lawson actually calibrated those data loggers. Didn't he?

A: I think the calibrations are wrong word. It is not calibration, it is programming.

Q: You're saying they were programmed, not calibrated?

A: Indeed. PIP says calibrate.

Q: Right.

A: But what was actually done was the programming.

Q: And Mr. Lawson programmed them.

A: Yes, sir.

Q: And you stood there and watched it.

A: Yes, sir.

Q: And you understood that the purpose of your PIP was to improve your performance.

A: That's right.

Q: Despite that understanding and despite the fact that you were told to calibrate the data loggers, which you interpreted as programming, you stood there and watched Mr. Lawson program each one of the 15 or 20 data loggers.

A: That's correct.

(TR 1717-1718)

Complainant's supervisors Meinershagen and Dodson also testified about Complainant's failure to meet his PIP requirements. Dodson testified that Complainant's work was deficient in accomplishing the requirements of the PIP.[16] Meinershagen testified that Complainant handed in his first PIP assignment, "Develop complete design bases for the FHB HVAC system," one day late. Meinershagen also stated that the assignment was incomplete and unacceptable. Meinershagen stated that Complainant merely photocopied documents prepared by other engineers and that this did not "meet the intent" of what he, Dodson, and Moaba wanted to see. (TR 2638-2640) Meinershagen

[16] Dodson testified in extensive detail that many of Complainant's submitted PIP items were submitted late and were incomplete and unsatisfactory. (TR 2947-2982)

testified that Complainant failed to complete his PIP assignments regarding calibration and installation of the data loggers (items one and two under the heading, "Containment Air Temperature Monitoring"):

Q: Mr. Meinershagen, did you have any discussions with Mr. Makam on July 16, 1997, regarding the completion of his PIP assignment relating to the programing of the data loggers?

A: He indicated that the data loggers had been programmed and ... returned to the warehouse and that the planner had been notified that the material was ... ready to be installed in the field.

Q: Did you ask him whether the planner was aware of that so that the data loggers could be installed?

A: Yes, I did.

Q: And what was his response?

A: At the time I asked him he had not called the planner. I told him that he needed to do that.

Q: Are there any later conversations regarding the programming of the data loggers?

A: Yes, later in the day I had made a comment to Phil Lawson and Phil had indicated that in fact he [Lawson] had actually done the programming on the data loggers.

Q: And what was your reaction to that?

A: I told him that he wasn't supposed to have done that, that this was [Complainant's] action to complete, not someone else's.

Q: Did you later speak to Mr. Makam about the programming of the data loggers?

A: Yes, I did.

Q: And what was that conversation?

A: I addressed the subject with [Complainant] and told him that it wasn't the intent of his PIP that he was supposed to get somebody else to do the work for him, that the assignment was for him to complete the work.

Q: And what did Mr. Makam respond?

A: He said that, yes, he admitted the fact that Phil had done the programming of the loggers for him, that he had found the computer program confusing and it was easier to just let Phil do the work rather than do it himself.

(TR 2636)

Meinershagen testified that Complainant's work performance was generally poor. Meinershagen also stated: "Whenever I asked Mr. Makam the status of his work basically he never

gave me an answer that was here's what he was doing to resolve the issue. It was always an answer that was an excuse for why he hadn't gotten it completed yet. And on the assignments that he did complete it was only after repeated prodding...that he was responsible for getting that answer completed and to meet the schedule, support the unit." (TR 2602, 2613)

Complainant argues that his PIP was "harsh and unachievable" with "unachievable specific project deadlines." However, there is no evidence to support this assertion. On the contrary, the record shows that Complainant's PIP was reasonable and achievable. When Complainant refused to cooperate in preparing his PIP, Moaba sought the advice of Straubmuller, who told Moaba to write the PIP for Complainant and to make sure that the PIP was "specific, measurable, and achievable." (TR 838) Further, Dodson testified that the PIP was "reasonable and quite within [Complainant's] capabilities to accomplish," and that the deadlines were ... reasonable...." (TR 2930) Moreover, both Dodson and Meinershagen testified that they informed Complainant that he could put any other work aside, and concentrate on meeting the requirements of his PIP. (TR 2626, 2941) Complainant also claims he did not get adequate support or feedback from Moaba, Meinershagen, or Dodson while on his PIP. However, the record does not show that Complainant ever specifically asked for support or feedback or that his supervisors refused to provide such support. Rather, the record shows that both Meinershagen and Dodson spoke to Complainant on several occasions regarding the progress being made on his PIP (see the testimony of Meinershagen and Dodson, above).

As evidence of Respondent's discriminatory motive, Complainant points to the fact that he was terminated "only sixteen days into a PIP that was supposed to last for ninety days under [Respondent's] standard policy." (Complainant's Proposed Findings of Fact, p. 20) I disagree with this interpretation of the facts. The evidence shows that PIP guidelines and procedures are at the discretion of management. As Howard Berrick, a senior engineer and a member of the panel at Complainant's ERRP hearing (selected by Complainant!), testified, the 90-day period for PIPs, although standard, is at the discretion of management and "if management felt that during the 90 day period there was no progress being made [on the PIP] it [is] their obligation or their right to terminate an employee." (TR 3974; R-42) Therefore, and based on the testimony of Moaba, Meinershagen, and Dodson that as of late July 1997 it was clear to them that Complainant was not successfully proceeding to the completion of his PIP, I find that Moaba and Dodson's recommendation to Straubmuller that Complainant be fired was reasonable and nondiscriminatory, even though it came only sixteen days after the commencement of his PIP.

Complainant also alleges that Moaba made false statements to Straubmuller which were instrumental in "getting [Complainant] fired." Complainant's primary allegations here are that Moaba incorrectly told Straubmuller that Complainant had done virtually nothing on his PIP assignments, and that Complainant had caused the plant to go into a tech spec violation. (TR 850-854) However, the evidence discussed above shows that Moaba had a reasonable basis to believe that Complainant had made little progress on his PIP. As to the second statement, Straubmuller acknowledged that she included this language in her summary which recommended that Complainant be fired. However, Straubmuller also stated that she misunderstood Moaba at the time of their

discussion and that upon reflection — since no tech spec violation had actually occurred — she was "sure he didn't say that," and that he must have told her that "we almost went into a tech spec violation." (TR 852-54, 868-69) Moreover, the record reveals that although senior vice president Burt Simpson read Straubmuller's summary when he approved Complainant's termination, he did not rely on that summary alone in making his decision. Simpson testified as follows:

> Q: What did you rely upon, sir, in approving the termination of Mr. Makam?
>
> A: ...My review of the entire document, not only assuming it was these few pages, but all the attachments, which basically indicated Mr. Makam's performance over a period of several years under various supervisors and managers was inconsistent. In other words, there had been meets standards and below standards [performance ratings]. That his unwillingness to fill out a PIP or to turn in a PIP indicated to me either he did not want to accept that he had any shortcomings, or for whatever reason, didn't want to participate. And the indications of the material included would indicate that he was not making adequate progress around those issues that he was told to do during his PIP period. So based on all of that, I agreed to sign off on the package.

(TR 2426) Further, Simpson presumably knew that there had been no tech spec violation and that Straubmuller's written statement to the contrary was incorrect.

Complainant also argues that he was discriminated against when he was not taken to the July 9 meeting with Garchow regarding the containment temperature and the MPR methodology, and when he was not included in the group that made the decision to revert back to the arithmetic method on July 18. I find that the evidence shows that these occurrences were not unlawfully motivated. Moaba testified that he did not take Complainant to the July 9 meeting with Garchow to present the revised temperature calculations for legitimate reasons:

> Q: Then at 12:30 on July 9 you met with Mr. Garchow. Why didn't you take Mr. Makam with you to the meeting after he had just authored the revised calculations report that you were satisfied with that morning?
>
> A: I did not take Mr. Makam because Mr. Makam very clearly did not prepare the curve that was the heart and soul of that report and he did not understand what was happening in that report and there was a feedback from the supervision and the other team members that he was a passive player that retrieved information upon request. So when I went to see Mr. Garchow, I took Mr. Meinershagen, who was the lead engineer, and we took Mr. Lawson, who in fact was the technical input person, if you will. He was the chief calculator. And [Lawson] sat outside in the anteroom in case we needed that kind of detail.

(TR 218) Further, Dodson testified that Complainant was not made a part of the group that made the decision to revert back to the arithmetic method because Dodson "didn't think that [Complainant] was capable of preparing the calculation in the time frame that we needed to have it prepared because of the work I'd seen him do so far." (TR 2664)

Based on the foregoing, I find there is no evidence that Respondent's actions against Complainant after the containment temperature issue arose on July 8, 1997 were retaliatory. I find that Complainant was placed on a PIP and eventually terminated for legitimate, nondiscriminatory reasons.

B. Complainant failed to establish the existence of a hostile working environment.

Complainant argues, in his brief, that he is entitled to a finding of strict liability for discrimination by being subjected to a hostile working environment. The Secretary has recognized that such discrimination is remediable under various environmental whistleblower protection provisions, including the ERA. Varnadore v. Oak Ridge Nat'l Lab., 92-CAA-2, (Sec'y, Jan. 26, 1996); Marien v.Northeast Nuclear Energy Co., 93-ERA-00049, (Sec'y, Sept. 18, 1995). A finding that a hostile work environment existed must be based on evidence that the employer's conduct was sufficiently severe or pervasive as to alter the conditions of employment and create an abusive work environment. Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986). To prove retaliatory discrimination in the form of a hostile work environment, an employee must establish five factors: that he engaged in protected activity and was intentionally retaliated against for such activity; that such retaliation was pervasive and regular; that the retaliation detrimentally affected him; that the retaliation would have detrimentally affected a reasonable person under the same circumstances; and that *respondeat superior* liability is appropriate. Straub v. Arizona Public Service Co., 94-ERA-37 (Sec'y April 15, 1996).

I have found that Complainant has failed to establish that Respondent's various actions against him were in retaliation for his (alleged) protected activity. Consequently, Complainant has failed to establish that he was subjected to a hostile working environment.

C. Complainant failed to establish that he was discriminated against after his August 1, 1997 termination.

Although I have found that Complainant engaged in protected activity after his termination, when he contacted the NRC on August 4 and 15, 1997 and Respondent's human resources department on August 15, 1997, and when he made allegations of retaliation at the November 21, 1997 ERRP hearing, I find no evidence to indicate that Respondent discriminated against Complainant after he was discharged on August 1, 1997. Although at the ERRP hearing on November 14, 1997, the panel knew that Complainant had filed complaints alleging that he had been discriminated against for protected activity, I find that the ERRP's December 1, 1997 decision to uphold Complainant's termination was based on legitimate, non-discriminatory reasons.

The ERRP panel consisted of chair Margaret Pego (Employer's corporate manager of human resources), Don Mansfield (manager of employee relations), Kurtis Bux (station planning

engineer), Gary Stith (senior systems engineer at Employer's Hope Creek plant), and Howard Berrick (senior engineer). Pego testified about the reasons the ERRP panel upheld management's decision to terminate Complainant, as follows (TR 2182):

> Q: And what did you rely on in supporting management's decision?
>
> A: We relied on the fact that Mr. Makam asked for a panel meeting because he claims he was fired in retaliation for raising a safety issue. He was asked repeatedly throughout the testimony what issue did he raise and whom did he raise it to. The only thing that he told us was he raised it to the NRC after he was fired. He was asked-- the panel also relied on the fact that there was testimony presented that said he was asked to prepare a PIP. He refused to do it. He didn't disagree with that. He agreed with what Mr. Moaba said. Mr. Moaba said, I'd asked him to prepare a PIP. He refused to do it. He presented his PAP, and argued he should be have continued to be on a PAP. He wasn't disputing his performance. He was disputing whether it was a PIP or PAP. He refused to do it, and he failed to make progress on it. That's what the panel looked at.

Berrick, who was selected by Complainant to be his representative on the ERRP panel, testified that he felt a "special obligation" to Complainant and that it was his intention to support Complainant as much as possible. (TR 3973) Nevertheless, Berrick testified that "at the time [the panel] made [its] decision [it] had sufficient information to rely upon that there was a basis to uphold management's decision to terminate [Complainant]." (TR 3988) Berrick also stated that he did not believe that any of the panel members had made up their minds to sustain the discharge before they had heard any evidence: "... I didn't get the impression that there were--that people had already predetermined this situation. No one--no one had seen any of the evidence up to that point in time." (TR 3978) Finally, Berrick stated that "based upon the information that was presented at the panel meeting," he did not "personally feel it was necessary to call other witnesses." (TR 3974)

Finally, the ERRP hearing record (P-68) reveals that the panel carefully examined whether Complainant's termination was justified. The hearing lasted five or six hours, during which there were opening statements, testimony, and closing statements from both Moaba and Complainant. The panel thoroughly questioned both Moaba and Complainant regarding the containment temperature issues, the MPR formula, Complainant's alleged safety concerns (i.e., what they were, to whom they were raised, and when), the placement of Complainant on a PIP, and Complainant's progress on his PIP.

Based on the foregoing, I find that the ERRP's decision to uphold Complainant's termination was based on legitimate, nondiscriminatory reasons, and that therefore Complainant has not established that he was the subjected to discrimination or retaliation subsequent to his August 1, 1997 termination.

CONCLUSION

I have found that Complainant did not establish that he engaged in protected activity prior to August 1, 1997, but that he did establish that he engaged in protected activity after his termination on that date. I have also found that Complainant has failed to establish that Respondent engaged in discrimination or retaliation against him in violation of the ERA either before or after his August 1 termination. In making these determinations, it has not been necessary to credit one witness over another, as there is no significant conflict about what conduct Complainant and Respondent engaged in. The only questions are whether Complainant's actions should be construed to constitute protected activity and whether Respondent's actions were based on an unlawful or discriminatory motive. In short, I have found all the witnesses to be credible in their testimony about the facts.

Based on my findings of fact and conclusions of law, the complaint must be denied.

ORDER

The complaint of Surendraiah Makam is denied.

Robert D. Kaplan
Administrative Law Judge

Date: February 19, 1999
Camden, New Jersey

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. §24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).